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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

HAIR INDUSTRY, LTD., ADORABLE HAIR-DO CORP., HOWARD TRESSES, INC., GEORGE ROSEN and RUTH ROSEN,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1964

HAIR INDUSTRY, LTD., ADORABLE HAIR-DO CORP., HOWARD TRESSES, INC., GEORGE ROSEN and RUTH ROSEN,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners prayer for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on January 26, 1965.

Opinions Below

The opinion of the Court of Appeals, affirming the order of the United States District Court for the Southern District of New York, rejecting the claim of Constitutional privilege herein, is reported at 340 F. 2d 510 and is reprinted as Appendix A hereto.

The memorandum opinion of the United States District Court for the Southern District of New York herein is as yet unreported and is reprinted as Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on January 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether, in the light of all the facts, the sole owner of a business personal to him shall nonetheless be deprived of his constitutional rights to prevent disclosure of his business records by the mere fact of his operating in the technical guise of a corporation.

2. Whether the State's visitorial powers over a corporation are extended to the Federal Government in any case?

3. Whether the facilitation of the collection of taxes should prevail at the expense of the individual rights of an "incorporated proprietor"?

The Constitutional and Statutory Provisions Involved

This case, and the petition presented involve the Fifth and Fourth Amendments to the Constitution of the United States and §§ 7402(b) and 7602 of the Internal Revenue Code of 1954 (26 U.S.C. 7402(b), 7602). The provisions of each of these are fully set forth as Appendix C hereto.

Statement of the Case

On November 12, 1963 petitioner George Rosen, the sole owner of the three corporations involved herein (5a, 6a),* appearing before a Special Agent of the Internal Revenue Service in response to certain summonses issued by that official pursuant to 26 U.S.C. 7602, invoked his personal privileges under the Fifth and Fourth Amendments to the Constitution of the United States and declined to deliver the books of the three corporations sought by the summonses (6a, 16a). No question has been raised as to the correctness of the issuance or service of the summonses or that the privilege was properly invoked, at least as to the manner in which it was invoked. This case, therefore, involves only the many-faceted issue of whether an "incorporated proprietor" in the circumstances of petitioner, George Rosen here, may invoke his Constitutional privileges to cover the books and records of his personal, though incorporated, business.

Petitioner, George Rosen (hereafter "petitioner" **), is the sole stockholder of Hair Industry, Ltd., which in turn is the technical sole stockholder of Adorable Hair-Do Corp. and Howard Tresses, Inc. (6a, 18a). The three companies are, in fact, a single business, engaged in the manufacture, distribution and mail-order sale of human-hair wigs and originally founded in 1909 by Isidor Rosen, now deceased, the father of petitioner (19a, 20a). Petitioner himself, entered the business, then known as Howard Wig Company,

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* References thus are to pages of appellants' appendix in the Court below.

** Petitioner Ruth Rosen is the wife of George Rosen, the person upon whom the summonses were served on October 28, 1963 during his absence.

originally on a part-time basis in 1933 at the age of 17, assuming general charge of it in 1939 (19a). With the exception of the period of his military service from 1942 to 1945 he has remained in control ever since (19a-21a). By 1945 petitioner had been joined by his brother and sister in the family partnership the business had become (19a). About 1946 Isidor Rosen, having decided to retire fully, turned the business over to his three children, who then decided to incorporate it primarily to avoid the appearance of direct competition with their own retailer customers. The three corporate names here inovlved were then adopted for the three principal areas of operation. *Hair Industry, Ltd.* was the *manufacturer; Adorable Hair-Do Corp.* was the *wholesaler* and *Howard Tresses, Inc.* continued as the *mail order* outlet (20a). Operation of the business, nonetheless, remained as before, in fact a simple family partnership. In 1949 complete ownership of the business passed into the hands of petitioner and he has owned it in its entirety since that time.

This business is entirely personal to petitioner. He is, as he has been most of his adult life, its principal operating personality—the hub on which the wheel turns. All decisions of more than the most routine interest (and even many of them) are made by him (21a). In this he is assisted by only two persons: his wife, who has worked with him since their marriage in 1941 (and who now has the nominal title of vice-president) and his brother-in-law who is the supervisor of the factory and shipping room where approximately fifteen people are employed (20a, 21a). Petitioner is, in fact, as well as in effect, the entire business.

On July 31, 1964 (3a) nearly nine months after the invocation of his personal Constitutional privileges by petitioner

and his declination to reveal the business books sought (all of the three companies' books for the three years ending October 31, 1962* (11a-15a)) the Government by order to show cause for enforcement of the summonses pursuant to 26 U.S.C. 7402 (b) and 7604. This motion was argued to the United States District Court for the Southern District of New York on September 24, 1964. On October 2, 1964 that Court filed its memorandum opinion granting the Government's motion.

An order was entered upon the District's Court's decision on October 14, 1964 (27a) and an appeal was taken to the United States Court of Appeals for the Second Circuit. That appeal was argued on January 13, 1965 and the opinion of that Court affirming the District Court was entered on January 26, 1965.

In its affirmation the Court of Appeals, while admitting that "there is some appeal to [the] argument" urged there and here by petitioners nonetheless denied petitioner's claim of Constitutional privilege on the ground of "the need of the sovereign for visitorial powers over its corporate creatures"—stating,

> "Today with the tax consequenses vis-à-vis the sovereign flowing from the use of the corporate form—income accumulation possible under some circumstances free from personal income tax, for example—the visitorial powers are more than ever necessary to the sovereign and justify the courts in holding that any claim to the personal privilege is relinquished as to corporate records by the choice of the corporate form for an individual's business."

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* Upon the return of the summonses, petitioner had in his possession all of the books sought, except those already in possession of the Bureau of Customs by virtue of their seizure under a search warrant on August 13, 1963.

Reasons for Granting the Writ

1. The central question presented is whether the sole stockholder of a small but incorporated business—the "incorporated proprietor"—is to be declared forfeit of the single most important right which he has as an individual, that of protection from self-incrimination, by the mere fact that his business is incorporated though it differs not a whit from any similar unincorporated enterprise. This issue is given added impetus by the fact of the stupendous growth of the use of corporate mode of doing business, even for the smallest and most humble of endeavors. Indeed, an analysis of business organization would reveal that we have passed beyond the familiar trio of corporation, partnership and single proprietorship and have added at least two new forms, the limited partnership and the incorporated proprietorship, each with its own scope and each with its own rights, duties and liabilities. In view of such growth, no longer can the mere *form* of the organization be the sole criterion in determining whether or not the essential provisions involved here may be invoked. The true test is that of *substance* and representation of interest by the one invoking the privilege.

2. The Court should consider whether the "visitorial powers" of the State, the sovereign which created the corporation creature are transferred to the Federal government merely by reason of the fact that the issues involved in a particular proceeding arise under Federal law. The corporation, except in an extremely limited number of cases, is given life by the State and not by the Federal government. It comes face to face with the Internal Revenue Code, or any other Federal revenue raising power already in

being and no further act of the government of the United States is required to further give it life. Even assuming that the technical, almost fictional (for its lack of use) power of visitation still exists, it is strictly limited to that sovereign which has give life to the corporation—the State —and cannot in any way be deemed to be transferred to the Federal sovereign.

3. This case also brings into focus the question of whether, despite the privileges granted by the Fifth and Fourth Amendments to the Constitution of the United States, the production of evidence possibly incriminating to the incorporated proprietor can nonetheless be compelled simply because of the practical circumstances of the collection of the revenue—possible "interference with the Internal Revenue Service" or because of "tax consequences." The Constitutional issue transcends these questions.

4. Finally, the Court should consider the issues in this case as an unsettled area of the law, particularly in view of the language of the Second Circuit in stating that "there is some appeal" to the arguments and questions raised by petitioner and also in view of the extraordinary action of the Ninth Circuit in a similar, slightly earlier case, where in that court, having first approved the raising of privilege by an incorporated proprietor subsequently reversed itself nearly without opinion.

I.

The test to be applied in determining whether the privilege against self-incrimination may be invoked to cover business books is that of *substance, not form.*

Had petitioner George Rosen invoked his personal Constitutional privileges under the Fifth and Fourth Amendments as to the records of his business were it not incorporated, in response to the Internal Revenue summonses demanding their delivery, there is no doubt that he would have been sustained in such invocation, *Boyd* v. *United States,* 116 U.S. 616 (1886); *United States* v. *Silverstein,* 210 F. Supp. 401 (S.D.N.Y. 1962), aff'd 314 F. 2d 789 (2d Cir.), *cert. den.* 374 U.S. 807 (1963).

But petitioner is an "incorporated proprietor", the sole stockholder—owner—of a business that, though run by and entirely personal to him, is corporate in form. Therefore, declared the Courts below, for that reason alone, he could not claim his personal privileges to cover his business books. The reasoning thus applied is wholly mechanical, syllogistic and based solely on an examination of form. Such reasoning, it is submitted, is totally wrong and should be rejected by this Court, for it interprets the Constitutional protection in that "hostile and niggardly spirit" explicitly eschewed by this Court, speaking through the late Mr. Justice Frankfurter, in *Ullman* v. *United States,* 350 U.S. 422 (1955).

The true test is that of substance over form laid down by this Court in *United States* v. *White,* 322 U.S. 694 (1944), in considering whether an officer of a labor union could invoke his Constitutional privileges to cover the records of that unincorporated association. This Court, after warning

that a conclusion as to whether the Constitutional privileges should be applied to particular records could not be "*reached by any mechanical comparison*", held:

> "The test rather is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." 322 U.S. at 701.

To apply this test, that *the one claiming the privilege must represent only his own interest* and not that of others, and *the papers to which he seeks the application of his own privilege must represent only his interest* and not that of others, to the case at bar, two questions must be asked: whose interest does George Rosen represent and whose interest do the papers sought represent? In both cases the answer is the same: George Rosen. He is the sole owner of the Corporation. He may do whatever he will with it; even, if he chooses, destroy it and all its assets and records completely. Yet he need answer to no one—no partner, no stockholder. In all respects, save the technical one of incorporation, he stands in precisely the same relation to his business as does the owner of a unincorporated single proprietorship.

Stated in these terms, it is of utmost importance that the writ sought herein be granted. To do otherwise would be to say that the rights of the incorporated proprietor must be declared forfeit simply, as an exercise in mathematical logic, because his small personal business happens to be of the same form as General Motors. The president of that

giant could not invoke his personal privileges to cover his company's books and records therefore (so goes the theorem) neither can the incorporated proprietor. But "the provisions of the Constitution are not mathematical formulas", *Gompers* v. *United States*, 233 U.S. 604, 610 (1914) and the application of those provisions cannot be determined "by any mechanical comparison" *United States* v. *White, supra.*

No direct review of the rights of the sole stockholder vis-à-vis his corporation's books had been undertaken by this Court since *Grant* v. *United States*, 227 U.S. 74 (1913), and even there that question was not central to the case. In that decision, generally considered in some measure a mere reaffirmation of *Wilson* v. *United States*, 221 U.S. 361 (1911), decided two years earlier (and holding that the custodian of the records of a *multiply* held corporation could not withhold them from a grand jury under claim of Constitutional privilege), this Court was deeply and primarily concerned with the attorney-client relationship.

Since the days of *Grant* and *Wilson*, however, the use of the corporate form for wholly owned businesses has grown immeasureably, the incorporated proprietor has become legion and his way of doing business truly a new form. Similarly, the large limited partnership has experienced a phenominal growth, also to the point of becoming a new form of enterprise. Here the Courts, noting the vast difference between the large multiply held limited partnership and the small family partnership have departed from the mechanical rule of *Boyd* v. *United States, supra*, which held that a member of a partnership could invoke his Constitutional rights to cover partnership documents. The Courts

have more recently applied the *White* test and held that while a member of a small family partnership *may* invoke his Constitutional rights, a member of a large limited partnership *may not, United States* v. *Silverstein supra; In re Subpoena Duces Tecum,* 81 F. Supp. 418 (N.D. Cal. 1948).

The differences between the incorporated proprietorship and the large publicly traded or multiply held corporation are perhaps even more compelling than those between the small family partnership and the large limited partnership. Such has been recognized not only by the commentators (see, e.g., Fuller, *The Incorporated Individual: A Study of the One-Man Company,* 51 Harv. L. Rev. 1573 (1938); Comment, 63 Colum. L. Rev. 1319 (1963); Comment, 46 Iowa L. Rev. 632 (1961)) but by the States and Federal government as well. In New York, the home state of petitioners here, for example, the 1963 enactment of the Business Corporation Law has made specific provision for the incorporated proprietor by requiring but one incorporator instead of three formerly required (§ 401), one director instead of thre (§ 702(a)) and permitting one man to hold the three principal offices (§ 715(e)). Congress, too, recognizing the distinctions inherent in the one man corporation has made provision for it through Subchapter S of the Internal Revenue Code (26 U.S.C. 1371-1377) and has permitted the incorporated proprietor to be taxed as what he in fact is: A single individual.

By granting the writ sought the Court will be able to correct an unjust situation and give encouragement to the hesitant first steps in this direction by certain Courts. See, e.g., *Application of Howard,* 210 F. Supp. 301 (W.D. Pa.

1962) and particularly *Wild* v. *Brewer*, F. 2d , *rev. on reh.* 324 F. 2d 924 * (9th Cir.), *cert. den.* 379 U.S. 914 (1964). The difficulties of the situation are there reflected by the fact that March, 1964 that Court gave assent by a vote of two to one to the claim of privilege by an incorporated proprietor and then in June, 1964, after what must have been three months of agonizing soul searching reversed itself, again by a vote of two to one. In the light of the *volte face* of that Court this Court should settle this serious national question.

The law concerning the incorporated proprietor is in a state of change and calls out for review by this Court. For this reason as well as the most compelling one of elemental justice the writ sought should be granted.

II.

There is no Federal "general visitatorial power" over State corporations and considerations of collection of taxes are secondary to Constitutionally protected individual rights.

In sustaining the District Court, the Court of Appeals implicitly accepted one of the two bases of the District Court's decision that

> "by making the criterion depend on proof that interests other than the sole stockholder of record are represented by the corporation could well inter-

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* The Court's first opinion was originally cited as 324 F. 2d 924 but has become unreported by its replacement at that citation by the opinion on the reversal on rehearing. Judge Madden's dissent there is essentially the same as the Court's first opinion.

> fere with the Internal Revenue Service's efforts to carry out its appointed tasks."

and rationalized its decision on the ground of "tax consequenses." These "tax consequenses", said the Court of Appeals, make "visitorial powers . . . more than ever necessary to the sovereign." Hence, the courts are "justified" in declaring that the rights of the individual are forfeited by the mere chance that his business, though wholly owned and indistinguishable in any real sense from a similar unincorporated business, happens to be incorporated.

In so ruling, the Court below placed primary reliance on the almost sixty year old case of *Hale* v. *Henkel,* 201 U.S. 43 (1906). That Court assumed, it appears from the opinion, that the *Hale* case gives general authority to the Federal government to exercise "visitorial powers" not normally belonging to it, over a corporation whenever it deems it is necessary. It is submitted that the Court of Appeals is entirely in error in this assumption and in its reliance on *Hale* v. *Henkel.*

It is the State sovereign, of course (here New York State), and *not* the Federal government which has given life to the corporations here involved. If either of these sovereigns has any visitorial power over a corporation (and such technical, even fictional powers, have become virtually nonexistent because of non-use), it is the *State* and *not* the Federal government which has the right to exercise such. This power is strictly limited to the State and it is in no way transferred to the Federal government. *Hale* v. *Henkel, supra,* created only a very limited and technical exception to the rule.

There, the Court, dealing with a claim of privilege against self incrimination by the corporation itself, acting through

one of its officers, held that such corporation could not "refuse to show its hand" and could not refuse the production of books under the claim of Constitutional privilege. The Court also held that the Federal, or as described there, the "General Government", might also be able to assert a "dual sovereignty" under its power "to regulate . . . interstate commerce" and thereby obtain limited "visitatorial" powers. But the Court also held that the Federal government obtained *no* "general visitatorial power over state corporations" 201 U.S. at 75.

Here we are not concerned with interstate commerce at all, rather we are concerned with the collection of income taxes imposed under a separate amendment to the Constitution. "Questions of interstate commerce", which formed the basis of the ruling in *Hale* v. *Henkel,* do not come into play at all in this case.

Moreover, the court should determine whether considerations of the collection of the revenue should gain paramountcy over the essential protection of the individual provided by the Fifth and Fourth Amendments to the Constitution. It is submitted that upon such confrontation questions of collection of revenue must take second position.

As the District Court for the Northern District of California stated in *Application of House,* 144 F. Supp. 95 (1956), at page 103,

> "The field of taxation represents probably the greatest single area of contact between individuals and the forces of the state. A slight invasion of the right against self-incrimination in this field has great and baleful consequence upon the relations between the individual and the state as does an invasion of that right in the more dramatic areas of public life."

The privilege of an individual against self-incrimination should not be lightly discarded or hung upon the thorn of mere happenstance. Where a business in the light of its constituancies and history is purely personal to the individual, then he should be permitted to apply his personal privileges to the books and record of that business, regardless of its legalistic form. The privilege, as this Court stated in *Ullman v. United States, supra,* "should be given a liberal application" and should "not [be] water[ed] . . . down by the subtle encroachments of judicial opinion."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, N. Y.
April 21, 1965

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 294—September Term, 1964.

(Argued January 13, 1965 Decided January 26, 1965.)

Docket No. 29301

HAIR INDUSTRY, LTD., ADORABLE HAIR-DO CORP., HOWARD TRESSES, INC., GEORGE ROSEN and RUTH ROSEN,

Appellants,

—v.—

UNITED STATES OF AMERICA,

Appellee.

Before:

SMITH, KAUFMAN and ANDERSON,

Circuit Judges.

Appeal from order of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *District Judge,* enforcing Internal Revenue subpoena for records of corporations wholly owned by individual appellants. Affirmed.

PER CURIAM:

George Rosen and Ruth Rosen, Hair Industry, Ltd., a corporation wholly owned by George Rosen, Adorable Hair-Do Corp. and Howard Tresses, Inc., wholly owned subsidiaries of Hair Industry, appeal from an order of the

Appendix A—Opinion of the United States Court of Appeals

United States District Court for the Southern District of New York, Dudley B. Bonsal, *District Judge,* enforcing an Internal Revenue Service subpoena for the books of the three corporations. We find no error and affirm the order of the District Court.

The single question presented by this appeal is whether the sole owner of a corporation can legally refuse to produce corporate records and documents on the basis of his personal constitutional privileges under the Fourth and Fifth Amendments. In this case, the Internal Revenue Service has attempted to subpoena the books of Hair Industry, Ltd., a family corporation owned in its entirety by appellant George Rosen, as well as the records of Adorable Hair-Do Corp. and Howard Tresses, Inc., both wholly owned subsidiaries of Hair Industry. The three corporations at one time functioned as a single family partnership but were incorporated prior to the period under investigation. The books are sought in investigations of the corporations' tax liabilities.

Relying on *United States* v. *White,* 322 U.S. 694 (1944), which denied the privilege for records of unincorporated associations only where held in a representative capacity, appellants urge that the test developed there is whether the one claiming the privilege represents his own interest and that, generally, in determining when the privilege can be invoked form must give way to substance. While there is some appeal to this argument, it is impossible to reconcile with the rationale of *Hale* v. *Henkel,* 201 U. S. 43 (1906), which based denial of the privilege on the need of the sov-

ereign for visitorial powers over its corporate creatures. Indeed, *United States* v. *White* reiterated the rule that the privilege cannot be utilized on behalf of a corporation. 322 U. S. at 699. Today, with the tax consequences vis-à-vis the sovereign flowing from the use of the corporate form—income accumulation possible under some circumstances free from personal income tax, for example—the visitorial powers are more than ever necessary to the sovereign, and justify the courts in holding that any claim to the personal privilege is relinquished as to corporate records by the choice of the corporate form for an individual's business. Corporate records, which would tend to incriminate a corporate officer, can be subpoenaed even where the corporation is a mere alter ego of its owner. *United States* v. *Fago*, 319 F. 2d 791 (2 Cir. 1963); *United States* v. *Guterma*, 272 F. 2d 344 (2 Cir. 1959). See also *Application of Daniels*, 140 F. Supp. 322, 327 (S. D. N. Y. 1956).

The order of the District Court is affirmed. Mandate may issue forthwith.

APPENDIX B

Opinion of Dudley B. Bonsal, U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#30446 Filed: Oct. 2, 1964

In the Matter of

of

HAIR INDUSTRY, LTD., ADORABLE HAIR-DO CORP., HOWARD TRESSES, INC., GEORGE ROSEN and RUTH ROSEN,

Respondents.

M18-304

Motion #111 9/22/64

BONSAL, *D. J.*

MEMORANDUM

The question presented by this motion is whether the personal privilege against self-incrimination guaranteed by the Fifth Amendment extends to the books and records of a corporation and its wholly-owned subsidiaries, of which corporation the person claiming the privilege is the sole stockholder, and where the corporation is carrying on an established family business which was originally conducted as a sole proprietorship.

The law in this circuit is clear that the privilege does not extend to the records of the corporation. *Lagow* v. *United*

States, 159 F. 2d 245 (2d Cir. 1946); *United States* v. *Guterma,* 272 F. 2d 344 (2d Cir. 1959). The Ninth Circuit recently reached the same conclusion in *Wild* v. *Brewer,* 329 F. 2d 924 (9th Cir. 1964).

Respondents contend that this rule is mechanical and "syllogistic" and should not be applied to a one-man corporation. However, in incorporating a sole proprietorship the former proprietor must accept the consequences as well as the privileges. Moreover, to depart from the existing rule by making the criterion depend on proof that interests other than the sole stockholder of record are represented by the corporation could well interfere with the Internal Revenue Service's efforts to carry out its appointed task.

The Government's motion is granted, and the respondents will appear before an officer of the Internal Revenue Service and produce the various documents set forth in the Internal Revenue summonses at at time and place to be fixed in the order to be entered herein.

Settle order on notice.

Dated: New York, N. Y.
October 2, 1964

DUDLEY B. BONSAL
U. S. D. J.

APPENDIX C

Constitutional and Statutory Provisions Involved

Constitution of the United States, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Fourth Amendment:

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Internal Revenue Code of 1954 (Title 26, United States Code):

§7402. Jurisdiction of district courts.

(b) To enforce summons.

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or

may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

§7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at-law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary of his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1096

HAIR INDUSTRY, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On October 28, 1963, the Commissioner of Internal Revenue issued three separate summonses pursuant to Section 7602 of the Internal Revenue Code of 1954, directing petitioner Ruth Rosen to appear before an officer of the Internal Revenue Service and to produce *corporate* books and records belonging to three corporations of which she was vice president (R. 11a, 13a, 15a, 21a).[1] No personal papers were sought. At petitioner's request, it was agreed that Ruth Rosen's husband, George (also a petitioner herein), who was president of the three corporations being investigated, could appear in her stead (R. 23a–24a).

[1] "R." references are to the appendix filed by the appellants in the court of appeals.

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Mr. Rosen appeared at the time and place designated in the summons and admitted that the corporate records covered by the summons were in existence and in his possession (R. 17a). However, he refused to produce these corporate records on the ground that to do so would violate his personal privilege against self-incrimination (R. 17a).

The government then moved pursuant to Sections 7402(b) and 7604(a) of the Code to compel the individual petitioners to produce the corporate records (R. 3a–4a). Petitioners' sole ground for opposition was their contention that the corporate records were clothed with Mr. Rosen's personal privilege against self-incrimination (R. 24a). The evidence showed that prior to 1949 the stock of Hair Industry, Ltd. (which holds all the stock of the other two corporations here involved) was owned by George Rosen, his brother and his sister; in 1949, he acquired their interests and has since been sole shareholder (20a). The district court rejected petitioners' argument and ordered production of the corporate records; the Second Circuit affirmed *per curiam* (Pet. 1A–3A). 340 F. 2d 510.

This Court has consistently held that a stockholder, officer or other custodian of corporate records may not interpose his personal privilege against self-incrimination when called upon to produce corporate records in his possession. *Wilson* v. *United States*, 221 U.S. 361; *Wheeler* v. *United States*, 226 U.S. 478, 490; *Grant* v. *United States*, 227 U.S. 74, 79–80; *Essgee Co.* v. *United States*, 262 U.S. 151; *United States* v. *White*, 322 U.S. 694, 700; *Nilva* v. *United States*, 352

U.S. 385, 392; *Curcio* v. *United States*, 354 U.S. 118, 122, 124–125, 128.

In the *Grant* case, *supra*, this Court was squarely faced with the precise issue here presented; it held that the privilege was unavailable even when the custodian was "the sole stockholder" of the corporation. 227 U.S. at 77, 80.[2]

Contrary to petitioners' suggestion (Pet. 8–10), *United States* v. *White*, *supra*, in no way departs from this settled principle. In *White* the court not only explicitly reaffirmed the principles enunciated in the above cases, but extended the principle even further, holding that in some situations the officers or members of even an *unincorporated* association may be denied the privilege against self-incrimination with respect to association records. Therefore, contrary to petitioners' assertions, the *White* case was not a repudiation of or limitation on the well established holdings of this Court regarding application of a personal privilege to *corporate* records.

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[2] This same view was recently approved by the Ninth Circuit in *Wild* v. *Brewer*, 329 F. 2d 924, certiorari denied, 379 U.S. 914, and is in accord with the prior Second Circuit decisions in *United States* v. *Fago*, 319 F. 2d 791, 792–793, certiorari denied, 375 U.S. 906, and *United States* v. *Guterma*, 272 F. 2d 344, 346.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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